Che Hasan bin Senawi v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO K-05–59 OF 2004
GOPAL SRI RAM, HASAN LAH AND VINCENT NG JJCA
22 JULY 2008

Criminal Procedure — Sentencing — Mitigation factors — Plea of guilt — Whether entitle accused to discount — Whether trial judge took into account mitigating factor — Whether sentence imposed manifestly excessive

The appellant was originally charged for the offence of murder under s 302 of the Penal Code ('the Code'), which was subsequently amended to one under s 304(a) of the Code. The medical evidence showed that the victim died from a single blow, by the appellant with a hammer, to her head. The appellant pleaded guilty to the amended charge and was sentenced to 19 years imprisonment with effect from the date of his arrest. The ground for his instant appeal was that the sentence was manifestly excessive. It was the appellant's case that there was provocation and he further submitted that the sentencing court had taken into account irrelevant considerations and failed to take into account relevant considerations when passing the sentence. The appellant also argued that being a first offender, his plea of guilt ought to entitle him to about one third discount when determining the measure of sentence.

Held, dismissing the appeal:

Whether a plea of guilt constitutes a mitigating factor would depend on the facts and circumstances of a particular case. Ordinarily in a case of this sort the maximum sentence of 20 years would have been imposed. It was entirely possible that the sentence of 19 years imposed reflected the intention of the learned judge to take into account the appellant's plea of guilt. In the circumstances, the court was unable to detect any appealable error on the part of the learned trial judge. Thus, the sentence imposed was not manifestly excessive and the appeal was accordingly without merit (see paras 7, 8 & 9); *Sim Gek Yong v Public Prosecutor* [1995] 1 SLR 537 followed.

[Bahasa Malaysia summary

Perayu pada asalnya dituduh atas kesalahan membunuh di bawah s 302

Kanun Keseksaan ('Kanun'), yang kemudiannya dipinda kepada kesalahan di bawah s 304(a) Kanun. Keterangan perubatan menunjukkan bahawa mangsa meninggal dunia akibat dari hanya satu pukulan, oleh perayu dengan tukul, pada kepala mangsa. Perayu mengaku bersalah atas tuduhan yang dipinda dan telah dihukum penjara 19 tahun dari tarikh penangkapannya. Alasan dalam rayuan ini adalah bahawa hukuman yang dikenakan adalah jelas melampaui. Ia adalah kes perayu bahawa terdapat provokasi dan selanjutnya menghujah bahawa mahkamah yang menghukum mengambilkira pertimbangan yang tidak relevan dan gagal mengambilkira pertimbangan yang relevan apabila memberikan hukuman. Perayu juga menghujah bahawa sebagai pesalah kali pertama, pengakuan bersalahnya sepatutnya memberikannya satu pertiga diskaun apabila menentukan tempoh hukuman.

Diputuskan, menolak rayuan:

Sama ada pengakuan bersalah menjadi faktor peringanan akan bergantung kepada fakta dan hal keadaan kes tertentu. Biasanya dalam kes yang sebegini hukuman maksimum 20 tahun akan dikenakan. Kemungkinan besar hukuman 19 tahun yang dikenakan membayangkan niat hakim yang bijaksana yang mengambilkira pengakuan bersalah perayu. Dalam hal keadaan tersebut, mahkamah tidak dapat mengesan apa-apa kekhilafan yang boleh dirayu pada pihak hakim perbicaraan yang bijaksana. Oleh itu hukuman yang dijatuhkan jelas tidak melampaui dan rayuan tersebut, oleh yang demikian, adalah tanpa merit (lihat perenggan 7, 8 & 9); *Sim Gek Yong v Public Prosecutor* [1995] 1 SLR 537 diikut.]

Notes

For cases on mitigating factors, see 5(2) *Mallal's Digest* (4th Ed, 2007) paras 4263–4267.

Cases referred to

Fu Foo Tong v PP [1995] 1 SLR 448, CA (refd)
Mohamed Abdullah Ang Swee Kang v PP [1988] 1 MLJ 167, SC (refd)
PP v Loo Choon Fatt [1976] 2 MLJ 256, HC (refd)
Sim Gek Yong v PP [1995] 1 SLR 537, HC (folld)

Legislation referred to

Penal Code ss 302, 304(a)

Appeal from: Criminal Trial No 45–01 of 2002 (High Court, Alor Star).

Loo Yook Khin (BC Teh & Yeoh) for the appellant.

Fatnin bt Yusof (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Gopal Sri Ram JCA (delivering judgment of the court):

[1] This is the judgment of the court.

[2] The appellant was originally charged for the offence of murder under s 302 of the Penal Code. However, at the commencement of his trial an amended charge under s 304(a) of the Penal Code was tendered by the prosecution. The accused pleaded guilty to the amended charge. He was sentenced to 19 years imprisonment with effect from date of arrest. He has appealed to us on the measure of sentence. His complaint is that the sentence is manifestly excessive.

[3] The facts of this case are straightforward. The victim, a lady was on her way home when she was accosted by the appellant who was riding a motorcycle. He made advances to her which she repelled. She then ran into her home and was pursued by the appellant who killed her with a hammer. The medical evidence shows that the victim died from a single blow to her head. Under these circumstances it can hardly be contested that the offence was committed in a most brutal fashion. It was suggested by learned counsel for the appellant that there was provocation in this case. It was also submitted that the sentencing court had taken into irrelevant considerations and failed to take into account relevant considerations when passing sentence upon the appellant. We have scrutinised the record most anxiously, in particular the judgment under the appeal and we find no merit whatsoever in this complaint.

[4] The facts placed before the court below revealed that there was no provocation offered by the victim. If any provocation was offered, it came from the appellant.

[5] Learned counsel has also argued, citing a number of authorities in support, that the appellant being a first offender, his plea of guilt ought to have entitled him to about one third discount when determining the measure of sentence. The decision of the Supreme Court in *Mohamed Abdullah Ang Swee Kang v Public Prosecutor* [1988] 1 MLJ 167 was relied upon in support of this submission. We would note at once that *Mohamed Abdullah Ang Swee Kang v Public Prosecutor* was a case concerning criminal breach of trust and not a violent crime. And, as Hashim Yeop A Sani J (later Chief Justice of Malaya) said in *Public Prosecutor v Loo Choon Fatt* [1976] 2 MLJ 256, when it comes to the imposition of punishment, each case depends on its own facts.

[6] In our judgment whether a plea of guilt constitutes a mitigating factor would depend largely on the facts and circumstances of a particular case. Where there is a course of circumstances similar to those that have occurred here, a plea of guilt, having regard to the seriousness of the case, carries little weight. As Karthigesu JA said when delivering the judgment of the Court of Appeal of Singapore in *Fu Foo Tong v Public Prosecutor* [1995] 1 SLR 448:

> It is not axiomatic that every plea of guilty 'entitles', as it was contended by counsel to a discount of between one-quarter to one-third of what might otherwise be considered an appropriate sentence after a trial. A plea of guilt can be of no mitigating value, for example, when the evidence overwhelmingly supports a conviction.

[7] Ordinarily in a case of this sort the maximum sentence of 20 years would have been imposed. It is entirely possible that the sentence of 19 years imposed reflects the intention of the learned judge to take into account the appellant's plea of guilt.

[8] In our judgment, the correct approach to be taken where the maximum or near maximum sentence is warranted is that set out in the judgment of Yong Pung How CJ in *Sim Gek Yong v Public Prosecutor* [1995] 1 SLR 537. The learned Chief Justice of Singapore expressed a view with which we respectfully agree. This is what His Honour said:

> The principles espoused above in *R v Tait and Bartley* (1979) 24 ALR 473 and *Bensegger v R* [1979] WAR 65 represent, in my view, the approach which should be adopted by a court towards the issue of maximum sentences. To restrict the maximum sentence to the 'worst case imaginable' would only invite an endless permutation of hypotheses. In the appellants' case, for instance, would the 'worst case imaginable' be one in which the custom officers had been injured? Or would it be one in which one of the officers had been killed? Or would it be one in which an innocent bystander had been fatally hit by the appellant's car? The possibilities are limitless and the uncertainty intolerable. All that a court can realistically do — and all that it should do — when deciding whether or not to impose a maximum sentence is to identify a range of conduct which characterises the most serious instances of the offence in question. This would, as the court in *R v Tait* and *Bartley* pointed out, involve consideration both of the nature of the crime and of the circumstances of the criminal.

[9] Taking into account all that has been said on the appellant's behalf we are unable to detect any appealable error on the part of the learned trial judge. In our judgment the sentence imposed is not manifestly excessive. The appeal

A is accordingly without merit. It is dismissed. The orders made by the High Court are affirmed.

Appeal dismissed.

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Reported by M Sivabarathi

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